



REPUBLIC OF KENYA



KENYA LAW
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**Wanjiru v Republic (Criminal Revision E008 of 2023)
[2023] KEHC 3295 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E008 OF 2023
GL NZIOKA, J
MARCH 31, 2023**

BETWEEN

KELVIN THUKU WANJIRU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide Criminal Case No. E1342 of 2022, with the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the charge are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, he was found guilty, convicted and sentenced to seven (7) years imprisonment
3. By an application filed on January 18, 2023, he seeks for review of sentence so that it is reduced and/or converted into a non-custodial sentence. The application is supported by a document titled “memorandum of sentence review” and his affidavit wherein he avers that he is a first offender and that the sentence meted out was harsh.
4. That he was just disciplining his child without the intention to cause any harm to his body and that he is remorseful and has learnt to be a law abiding citizen. Further he comes from a poor family background and is the sole breadwinner. Therefore, his imprisonment has left the family in a difficult situation and prays for leniency.
5. The respondent filed submissions opposing the application and stated that the trial magistrate considered the circumstance of the case and the applicant’s mitigation before sentencing him. That, the applicant committed grievous harm to a child who he owed a duty of care as a parent and does not deserve a lenient sentence.



6. Further, the Supreme Court in Petition No 15 of 2015 (Consolidated) *Francis Karioko Muruatetu another v Republic* recognized the objectives of sentencing to include deterrence. Furthermore, the maximum sentence for the offence is life imprisonment and as such the sentence meted out is merited but the court should mete out a harsher sentence.
7. The court ordered for and a pre-sentence report dated; March 14, 2023, was filed which indicate that the applicant is 26 years old and the 1st born out of five (5) siblings. That he is not married and has no dependents. He has a permanent place of abode at his parent’s land and that his mother is a farmer at Engineer Sub- County.
8. That he completed his secondary education and obtained a mean grade of x- in his KCSE. He was working as a Boda Boda operator before his arrest and consumes alcohol occasionally.
9. He is stated to be remorseful and prays for leniency. That he desires to enrol for a mechanic course upon his release. Further his mother states that they have positive relationship and she visits him in regularly while in prison. Moreover, he is a good person though greatly influenced negatively by peer pressure. Furthermore, the family is willing to give him the necessary support upon release and pleads that he be granted a non-custodial sentence.
10. The report indicated the Community has no issues with his release. However, the complainant relocated to an unknown place and could not be traced and therefore his views are not captured in the report.
11. That the Prison authority indicates that he works at the staff line industry and has no record of indiscipline and co-exists peacefully with his fellow inmates and prison officials. The Probation officer notes that he is youthful and a first time offender and recommends that in the spirit of decongesting the Prison he be granted a favourable sentence and placed on community service programme for two (2) years which he can perform at Engineer Law Courts.
12. In considering the application, I note the revisionary power of the High Court is provided for under sections 362 of the *Criminal Procedure Code* (herein “the Code”), which states as follows:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”
13. However, the above section should be read together with section 364 of the Code which provision states as follow: -
 - “(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
 - (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an



advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

14. It is therefore clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.
15. Therefore, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major SS Khanna v Brig FJ Dillon* 1964 AIR 497, 1964 SCR (4) 409).
16. To revert back to the matter herein, I have considered the application and the affidavit and/or mitigation factors in support thereof. I have also considered the nature of the offence the applicant was charged with and the sentence provided for the same.
17. The applicant was convicted and sentenced in relation the offence under section 234 (b) of the *Penal Code* which states that: -

“ Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”
18. Pursuant to the aforesaid provisions the sentence of seven (7) years herein is lawful and legal. It is noteworthy the offence is a serious offence as evidenced by the sentence of life imprisonment provided under the law. I have further considered the respondent’s submissions and the pre-sentence report. It suffices to note that although the report which is dated March 13, 2023, indicates the complainant could not be reached, a similar report filed in the trial court dated December 21, 2022, clearly details the views of the complainant.
19. The same indicates and so does the trial court record, that the complainant suffered serious injuries and as per the report dated December 21, 2022, he is affected physically, emotionally and psychologically as the surgery to his eye has lowered his self-esteem. Therefore, the sentence to be meted out ought to take that into account.
20. I further find that, although the pre-sentence report recommends a non-custodial sentence and in particular community service order under the *Community Service Order Act*, the sentence herein being seven (7) years is not subject to community service order as the *Community Service Order Act* relates



to sentences of three (3) years and below. In the given circumstances I find no merit in the application and dismissed it accordingly.

21. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 31ST DAY OF MARCH, 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant present in person, in court virtually

Mr Atika for the Respondent

Ms Ogutu: Court Assistant

